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# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

DAVID H. RIDDLE, APPELLANT,
*v.*
JAMES E. DYCHE, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA. } No. 663.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

The appellant was tried, convicted, and sentenced in the District Court of the United States for the Eastern Division of the Northern District of Alabama for the commission of a felony (Rec. 27), the record stating that "to try this cause come a jury of good and lawful men duly impaneled, sworn and charged a true verdict to render according to the law and the evidence." (Rec. 26.) After conviction and sentence he filed a motion setting forth that as the result of an agreement between himself and the District Attorney the case was tried before a jury of eleven, and asking to

have the record amended so as to show that alleged fact. Later during the same term of court he filed another motion to set aside the judgment upon the same ground. The record recites that after hearing the evidence and argument the Court was of the opinion that the record was as it should have been, and that it did not need amendment, and denied the motion, and the subsequent motion to set aside the judgment. (Rec. 58, 59.) The record discloses exceptions to both orders (Rec. 60), *but no exception to the constitution of the jury was taken until after the verdict of guilty and the pronouncement of sentence.*

No bill of exceptions can be allowed by the court below, nor entertained by the appellate court, unless it appears from the record that an exception was taken to the ruling of the court below. *Gila Valley G. & N. R. R.* v. *Hall*, 232 U. S. 94; *Magruder* v. *Drury*, 235 U. S. 106; *Montana Railroad Company* v. *Warren*, 137 U. S. 348, 351; *Grant Brothers* v. *United States*, 232 U. S. 647, 660.

Appellant subsequently endeavored to secure a writ of mandamus from this Court to direct the trial court to amend its record so as to show that he was tried before and convicted by a jury of eleven. This Court denied the writ of mandamus (255 U. S. 450) upon the ground that appellant might have saved the point by an exception at the trial, or by a bill of exceptions to the denial of his subsequent motion to set aside the judgment, setting forth whatever facts or offers of proof as were material, and then have brought a writ of error; and, because as a

statutory method by writ of error was provided for reviewing the judgment, mandamus could not be used for reviewing the action below or to reverse a decision of record.

Appellant having failed to secure a writ of mandamus from this Court (directing the trial court to amend its record so as to show that the case was tried before a jury of eleven), sued out a writ of error to the Circuit Court of Appeals with a bill of exceptions *not* containing his objection that he was tried and convicted before and by a jury of eleven, and this even though he might have saved the point, as Mr. Justice Holmes said in the mandamus case, "by an exception at the trial or by a bill of exceptions to the denial of his subsequent motion, setting forth whatever facts or offers of proof as were material, and then have brought a writ of error." The Circuit Court of Appeals affirmed the judgment of the lower Court. (279 Fed. 216.)

In explanation of the reason why the appellant herein did not carry his point to the Circuit Court of Appeals on a writ of error, counsel for appellant, in the brief filed in the mandamus case, No. 27 Original, in this court, states, page 31, "No separate writ of error could have been sued out by petitioner on the judgment of the District Court to amend the record in the case. The writ of error would necessarily have to be sued out and take up the entire case. It is manifest that petitioner will get no relief from a writ of error on the judgment denying the motion to amend the judgment without having the original

judgment of conviction reversed, and the Appellate Court, considering the whole case, would have no way of knowing that there was only eleven men on the jury unless the District Judge is required to state that there were only eleven men on the jury; and if he does state that fact, as he should state it, the motion to amend the judgment and proceedings thereon would be immaterial." We do not follow this line of reasoning.

Furthermore, counsel for appellant, on page 63 of another brief in the mandamus case states: "This court, when it 'analyzes the facts,' will determine that the ruling of Judge Grubb denying the petition *was purely a decision of a question of law.*" In the brief in the present case counsel for appellant states: "Counsel is not unmindful of the principle, nowhere more clearly stated than by this court in the Frank case, as follows (237 U. S. 309, 326):

> Mere errors of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error.

Counsel for appellant, having previously admitted that Judge Grubb's ruling denying the petition "was purely a decision of a question of law," now states that mere errors of law, "however serious, can not be reviewed by habeas corpus." Evidently the present counsel for appellant does not concur in the views expressed by his previous counsel.

Appellant then applied to this Court for a writ of certiorari, which was denied. (259 U. S. —.) In appellant's brief in support of his petition for a writ of certiorari, at page thirty, his counsel states:

> In conclusion, counsel does not feel justified in directing attention to petitioner's assignments numbered 113 and 114 (R. 816, 819) dealing with the constitution of the jury empaneled and sitting in the case.

The subject of this assignment was before this Court in the case entitled Ex parte Riddle, 255 U. S. 450, in which the circumstances of the empaneling and constitution of the jury are fully set forth, and in which the Court felt constrained to deny the writ of mandamus prayed, closing its opinion in the following words:

> In this case the facts were more or less clearly admitted in argument, but the record does not establish them, and the extent of the agreement or dispute with regard to them does not change the remedy to be sought.

As the appellant has thus admitted that the circumstances of the impaneling and the constitution of the jury were "fully set forth" in the previous mandamus case in which the court denied the writ because the "record" did not establish them, it is difficult to reconcile this former mental attitude with his present attempt to attack *collaterally* the verity of the trial record in a habeas corpus proceeding. Parol evidence can not be used to vary the record with any more success in habeas corpus than in mandamus.

On July 7, 1922, appellant sued out a writ of habeas corpus in the United States District Court for the Northern District of Georgia, which discharged the rule and remanded the petitioner to the custody of the Marshal. From that judgment the case is now again here on appeal.

ARGUMENT.

I.

*Appellant can not attack the verity of the record collaterally in a habeas corpus proceeding by the introduction of extrinsic evidence inconsistent with it; and especially so after he has already unsuccessfully applied for a writ of mandamus to accomplish the same result; and, conclusively so, after he has failed to save the question properly upon error proceedings to the Circuit Court of Appeals, and has totally abandoned his sole contention in his subsequent application for a writ of certiorari in this Court.*

This is an attempt to attack the verity of the record in a cause wherein a final judgment of a court of competent jurisdiction has been rendered; such a judgment, valid on its face, is an unanswerable return to a writ of habeas corpus. The jurisdiction of the Court to try the appellant is not disputed and the error sought to be corrected collaterally on a petition for habeas corpus is *procedural*.

If any such irregular action has occurred, as appellant complains, he has had his remedy by mandamus, by error, and by certiorari. And although, possibly, on a review in a proper proceeding by an appellate court, the objections presented might

be amply sufficient to procure a reversal of the judgment, yet appellant can not make the proceeding by habeas corpus a short cut to the same result, and now substitute it for the writ of error which he mistakenly abandoned. Advantage can not be taken in this manner of the alleged defect in the proceeding, even though it might be sufficient to cause the reversal of the judgment on writ of error. Any errors alleged to have been committed in the trial court's determination of the motion to set aside the judgment do not constitute jurisdictional defects. On habeas corpus there can be no inquiry into an alleged defective or irregular selection of a jury; conclusively so, when the record is regular upon its face, and no proper exception has ever been taken to attack its verity. His guilt is now *res adjudicata*, the exact question having been litigated by him unsuccessfully in the original case, and the ruling upon it having never been properly appealed from, and the stability of such adjudication can not be affected by possible errors in procedure. Ex parte Parks, 93 U. S. 18, 23, wherein Mr. Justice Bradley, delivering the opinion of the Court, said: "If the court had jurisdiction and power to convict and sentence, the writ can not issue to correct a mere error." *Frank* v. *Magnum*, 237 U. S. 309, 334. If error were committed it is obliterated by a final judgment after the defendant has had his day in court.

It is a principle of law long since firmly established that the judgment of a court of competent jurisdiction so long as it stands in full force and unreversed can not be impeached in a collateral proceeding in habeas corpus aimed at attacking the verity of the record. If the record shows the facts necessary to confer jurisdiction, its averments are final and conclusive in every collateral proceeding and can not be contradicted by any extraneous evidence. Black, in his work on Judgments, Vol. 2, Sec. 625, clearly states the rule:

> * * * The averments or disclosures of the record, in respect to the matters decided, cannot be contradicted by any extraneous evidence. They may be explained, when ambiguous. They may be made specific when generally expressed. But they can not be contradicted. (Citing numerous authorities.)

This record states that "to try this cause come a jury of true and lawful men duly impaneled, sworn, and charged a true verdict to render according to the law and the evidence." Any attempt now to attack the verity of this record, regular upon its face, by a collateral proceeding in habeas corpus must necessarily prove futile. *McCormick* v. *Sullivant*, 10 Wheat. 192; *Walker* v. *Cronkite* (C. C.), 40 Fed. 133, and a "multitude of cases." (See following quotation.) In the leading case of *In re Mayfield*, 141 U. S. 107, 116, Mr. Justice Brown, in delivering the opinion of this court, used the following apposite language:

> The point is taken in the brief submitted by the Attorney General that the Supreme Court

has no power to consider this question upon an application for a writ of habeas corpus. This court has held, however, in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry involved an examination of facts outside of, *but not inconsistent with*, the record. Ex parte Yerger, 8 Wall. 85; Ex parte Virginia, 100 U. S. 339; Ex parte Carll, 106 U. S. 521; Ex parte Yarbrough, 110 U. S. 651; Ex parte Bigelow, 113 U. S. 328; Re Nielson, 131 U. S. 176; Re Savin, 131 U. S. 267. In re Cuddy, 131 U. S. 280, it was held directly that where the petitioner had been committed for a contempt he was at liberty, upon application for a writ of habeas corpus, to allege and prove facts *not contradictory* to the record, which went to show that the court was without jurisdiction.

In *Phebus* v. *Search*, 264 Fed. 407, 411, Judge Sanborn, delivering the opinion of the Circuit Court of Appeals, said:

> * * * judgments of courts empowered to hear and determine issues relative to the subject matters and persons to the suits affected by their respective decisions, although such judgments may be illegal and wrong, are simply voidable and are not open to collateral attack. *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 Fed. 316, 318, 319, 8 C. C. A. 635, 637, 638; *Deming* v. *McClaughry*, 113 Fed. 639, 650; 51 C. C. A. 349, 360; *King* v. *McAndrews*, 111 Fed. 860, 863; 50 C. C. A. 29, 32.

Further authorities establishing this point are too numerous to mention.

In *Frank* v. *Magnum*, 237 U. S. 309, 331, much relied upon by appellant, this court held that a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, and even though it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the State court to proceed to judgment against him.

In the present case appellant has already attempted to test the jurisdiction of the trial court by offering the same line of proof in his mandamus application as he now offers in habeas corpus, and this court denied the writ because appellant might have saved the point by an exception of the trial, or by a bill of exceptions to the denial of his subsequent motion to set aside the judgment, setting forth facts or offers of proof as were material, and then have brought a writ of error. This being the situation, when the identically same *point* is before this court again, this time in habeas corpus instead of mandamus, there is now less justification "to look behind and beyond the record of his conviction."

The holding in the *Frank case* that a prisoner may have a judicial inquiry looking "behind and beyond the record of his conviction" evidently did not mean that the prisoner could attack the verity of the record by offering proof of facts

not only outside of, but also inconsistent with and contradictory to the record. That this is so, is shown by the fact that the cases of *In re Mayfield, supra,* and *Cuddy, Petitioner, supra,* are cited. The former case holds that the judicial inquiry can not involve an examination of facts "inconsistent with the record"; the latter case holds that the petitioner can not allege or prove facts "contradictory to the record."

In the very recent case of *Moore, et al.,* v. *Dempsey, Keeper of the Arkansas State Penitentiary,* decided February 19, 1923, a writ of habeas corpus was applied for upon the ground that the proceedings in the State Court, although a trial in form, were only a form, and that the appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without, according to them, due process of law. This was not a question of procedure. If true, it was an absolute denial of any trial whatever.

The petition was dismissed upon demurrer, and the statement of this court was confined to the facts admitted by the demurrer. The case was remanded to the District Court for a rehearing in order that the District Judge might examine the facts for himself, "when," as Mr. Justice Holmes stated, "if true as alleged they make the trial absolutely void." He concludes his opinion: "We have confined the statement to facts admitted by the demurrer. We will not say that they can not be met, but it appears to us unavoidable that the District Judge should find

whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed."

The situation in the present case is very different. Herein the trial judge heard the motion to amend the record so as to show that the jury was composed of eleven men only, and the appellant produced and offered testimony by witnesses in his effort to establish the truth of his contention; and after a full hearing, the court denied the motion. (Rec. 33, 34.) Subsequently appellant presented a motion to set aside the judgment upon the several grounds "(1) that the judgment entry therein was and is false; (2) that no jury was empanelled in said cause; (3) that the pretended verdict on which such judgment was based was rendered by eleven men and not twelve, and was and is therefore void and of no effect; (4) that the said pretended jury which rendered said pretended verdict on which the said pretended judgment was based was composed of eleven men and no more; (5) that the recital aforesaid that to try the said cause had come a jury of good and lawful men was and is false and deprived petitioner of his constitutional right to a trial by jury, etc." After hearing and argument the trial judge denied it.

In the *Moore case* the District Judge dismissed the petition on demurrer, and held that if the petitioner had open to him an adequate correctional method for reviewing the action of the trial court, he could not have resorted to habeas corpus. In the instant

case appellant has had open to him an adequate correctional method for review, but has abandoned it by not properly saving his question in error proceedings. The essential differences between the *Moore case* and the instant case may be summarized as follows:

1. In the *Moore case*, the District Judge held that the petition showing a complete denial of any trial in due course was insufficient, and refused to issue the writ. The Supreme Court held that he was in error, and should have issued the writ and heard the case. In the instant case, the District Judge issued the writ and discharged it after a hearing.

2. In the *Moore case*, the matter relied upon by the petitioner to avoid the conviction was matter that could form no part of the record of conviction and was inherently extraneous. It was the domination of the trial tribunal by a mob. It virtually meant a dissolution of the Court. In the *Riddle case*, the record recited a trial in due course, and the contrary could be shown only by oral and extraneous evidence directly contradicting the record.

3. In the *Moore case* the conviction was had in a State Court, and the appeal was to a State Court. In the *Riddle case*, appeal might have been had to the Supreme Court of the United States. In the *Moore case* the Supreme Court reiterated the doctrine of the *Frank case* (*Frank* v. *Mangum*, 237 U. S. 309), that if the petitioner had had open to him an adequate correctional method for reviewing the action of the trial court, he could not have resorted to habeas corpus.

In the *Frank case* the Supreme Court held that the Georgia law afforded such a correctional method, and the writ was disallowed. The adequacy of Riddle's remedy, without resort to habeas corpus, aligns this case with the *Frank case*, and differentiates it from the *Moore case*.

4. The legality of Riddle's conviction is *res adjudicata*, the exact question having been litigated by him unsuccessfully in the original case, and was neither appealed from or reversed. In the *Frank case* former Chief Justice White said (237 U. S. 309–333):

> Whatever question is raised about the jurisdiction of the trial court, no doubt is suggested but that the Supreme Court (of Georgia) had full jurisdiction to determine the matters of fact and questions of law arising out of the alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. It is not easy to see why appellant, is not upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction can not afterwards be disputed between the same parties. *Sou. Pac. R. R. Co.* v. *U. S.*, 168 U. S. 1, 48. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application, in habeas corpus cases, with respect to decisions by such courts of the facts pertaining to the

jurisdiction over the prisoner, see Ex parte Terry, 128 U. S. 289, 305, 310, Ex parte Columbia George, 144 Fed. Rep. 985, 986.

Apart from these distinctions, the *Moore case* was in its very nature extraordinary and so abnormal that its doctrine should be restricted to its own peculiar facts. A destruction of the independence and freedom of a Court by mob violence presents an extraordinary situation, to which decisions as to other Courts, whose competency and freedom to act are not in question, are inapplicable. The *Moore case* was, we submit, not intended to destroy all orderly procedure by holding that after a convicted defendant has exhausted all his rights by resort to appellate courts, he can begin all over again in a habeas corpus proceeding by asking one District Judge to sit in judgment on appellate tribunals.

## II.

*A trial by a jury of eleven members with the defendant's assent is a procedural defect only and is not fundamentally a denial of a right of trial by jury.*

With no abandonment whatsoever of the contention that the appellant may not successfully attack the verity of the record collaterally in this habeas corpus proceeding; and, that, therefore, the question of the constitutionality of his trial before an alleged jury of eleven is not herein properly presented, we desire to briefly consider the subject of a trial by jury.

This court decided in *Maxwell* v. *Dow*, 176 U. S. 581, that the trial of a person in a state court for a felony before a jury of eight was constitutional, the state statufe providing a trial by that number except in capital cases, *holding* that this is a question properly to be determined by the citizens of each state for themselves, and that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government, and that the conviction by a jury of eight did not abridge the convict's privilege and immunities under the Constitution as a citizen of the United States, and did not deprive him of his liberty without due process of law.

It is, however, true that in *Thompson* v. *Utah*, 170 U. S. 343, 353, this court held that under the laws of the Territory of Utah it was not within the power of one accused of a felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt; and that the law in force when his crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court, and jury of twelve persons.

In *Commonwealth* v. *Dailey*, 12 Cush. 80, the defendant in a misdemeanor case waived his right to a full panel and consented to be tried by eleven jurors, and this action was sustained by the Supreme Court

of Massachusetts. Chief Justice Shaw, delivering the opinion of the court, said:

> He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court.

In *Rassmussen* v. *United States*, 197 U. S. 516, this court held that by virtue of the Fifth and Sixth Amendments to the Constitution it was beyond the power of Congress to deprive one accused in Alaska of a misdemeanor of trial by a common law jury, and that Section 171 of the Alaska Code, 31 Stat. 358, in so far as it provided that in trials for misdemeanors six persons shall constitute a legal jury, was unconstitutional and void, because Alaska had been incorporated into the United States and the Constitution was applicable to that territory. The court in its opinion stated (p. 526):

> Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guaranties of the Fifth, Sixth, and Seventh Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution.

In *Dorr* v. *United States*, 195 U. S. 138, this court held that as Congress did not extend the right of a trial by jury to the Philippine Islands, and had not

incorporated them into the United States as to make the provision apply by implication, the right to a trial of jury did not exist, and the *ratio decidendi* of this decision was that a jury trial was procedural and not a fundamental liberty.

In *Hawaii* v. *Mankichi*, 190 U. S. 197, 199, the accused was convicted of manslaughter, in alleged violation of the Constitution, in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, following the usual course of procedure in the Republic of Hawaii, prior to its incorporation as a territory of the United States, but subsequent to the Resolution of July 7, 1898, annexing Hawaii. That Resolution provided that the municipal legislation of Hawaii *not inconsistent with the Constitution of the United States* should remain in force until Congress otherwise determined.

Mr. Justice Brown, delivering the opinion of the court, affirming the judgment of conviction, stated:

> But we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure, etc.

The two rights referred to were a trial based upon an indictment found by a grand jury, and a trial before a common-law jury of twelve.

From a consideration of these leading cases upon the subject of the right of a trial by jury it appears that a citizen of the United States may be convicted of a felony in a state court of Utah by a jury

of eight (*Maxwell* v. *Dow*, *supra*), but that he could not be convicted of even a misdemeanor in Alaska except by a jury of twelve. (*Rassmussen* v. *United States*.) The American citizen in the Philippines is entitled to no jury trial at all. (*Dorr* v. *United States*, *supra*.) When Utah was a Territory the citizen could be convicted of a felony only by a jury of twelve, but since it has become a State he may be convicted of a felony by a jury of only eight. The same citizen who could not lawfully be convicted of even a misdemeanor in Alaska except by a jury of twelve may be convicted upon information in Illinois of a misdemeanor without any jury trial at all, having waived the same and consented to trial by the court. (*Schick* v. *United States*, *supra*.)

However, the question in the instant case is not whether a jury must consist of twelve, but whether a defendant may waive the right to a verdict of twelve jurors and accept a verdict of eleven jurors.

The petit jury originated as an alternative for the trial by ordeal. Towards the end of the twelfth century the criminal petit jury was established on a definite basis, but the right to trial by jury in criminal cases was apparently a matter of privilege for a time, to be purchased for a consideration; by the end of the thirteenth century, trial by jury in criminal cases had become well established as a matter of right. Refusal of a defendant to submit to a jury trial was at one time treated somewhat like a confession of guilt. To-day, when the accused pleads guilty, he thus waives his right to a trial by a jury, whether it be

composed of twelve, or less than twelve jurors. An innocent man may plead guilty to shield the actual culprit, as public policy does not demand that a jury alone must pass on his guilt or innocence.

While Magna Charta provided that no man shall be deprived of his life, liberty or property unless "by the lawful judgment of his peers and by the law of the land," and this has been popularly but erroneously accepted as a guaranty of a trial by jury, yet "such trials, in their present form, did not come into existence until some time later, and the phrase 'lawful judgment of his peers and the law of the land'—meant nothing more than a guaranty of the right to trial by one of the then existing modes—or, as Bigelow says, by 'duel, ordeal or compurgation in criminal cases.'" (Moschzisker's on Trial by Jury, page 265.)

There is no special magic in a trial by a jury composed of twelve persons. A jury at different times and in different countries has had different numbers. (See text book last hereinbefore cited.) Under the Constitution any recognized proceeding of the common law meets the requirements of due process, and in the absence of a constitutional provision to the contrary a state law may provide for the trial of persons for crimes, infamous or otherwise, either without a jury at all or before a jury composed of less than twelve. *French* v. *Barber Asphalt Paving Company*, 181 U. S. 324.

As previously quoted, in *Hawaii* v. *Mankichi*, *supra*, Mr. Justice Brown, delivering the opinion of this

court, stated that the right to be tried before a common law jury of twelve was not "fundamental in its nature."

In *Schick* v. *United States*, *supra*, Mr. Justice Brewer, delivering the opinion of the court, declared that the right of a trial by jury, given the accused by the Sixth Amendment, was one that could in some instances be waived.

He said:

> But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of petty offenses, upon what ground can it be contended that a defendant therein may not voluntarily waive a jury? Can it be said that a defendant can plead guilty of the most serious, even a capital, offense, and thus dispense with all inquiry by a jury, and can not when informed against for a petty offense waive a trial by jury?
>
> Article Six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right "to be confronted with the witnesses against him. * * * and to have the assistance of counsel." Is it possible that an accused can not admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no

> public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.

There is no constitutional nor statutory mandate requiring that one accused of a felony in a Federal Court *must* be tried before a jury of twelve. There is no public policy requiring it; for, if there were, that same public policy would prohibit the trial of an accused for a felony in a *State* court before a jury of six, or with no jury at all, if the State statutes so provided. *Hollinger* v. *Davis*, 146 U. S. 314.

If public policy requires that a man must be tried by a jury of twelve, even if willing to be tried by eleven, why does it permit men charged with felonies to waive a trial altogether by a plea of guilty?

In *United States* v. *Rathbone*, 2 Paine 578, it was determined that the right to trial by jury was for the *benefit* of parties litigating in courts of justice, and might accordingly be waived. In *Bank of Columbia* v. *Okely*, 17 U. S. 235, 243, Mr. Justice Johnson, delivering the opinion of the court, said:

> And if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable, that he can not dispute the justice of the claim. That this view of the subject is giving full effect to the seventh amendment of the Constitution, is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms

been that "the trial by jury *shall* be preserved," it might have been contended that they were imperative, and could not be dispensed with. But the words are, that the *right* of trial by jury shall be preserved, which places it on the footing of a *lex pro se introducta*, and the benefit of it may therefore be relinquished. As to the words from Magna Charta, incorporated into the constitution of Maryland * * * they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by established principles of private rights and distributive justice. With this explanation, there is nothing left to this individual to complain of. What he has lost he has voluntarily relinquished, and the trial by jury is open to him, either to arrest the progress of the law, in the first instance, or to obtain redress for oppression, if the power of the bank has been abused.

In the recent case of *Ex parte Peterson*, 253 U. S. 300, Mr. Justice Brandeis, in a most interesting opinion, said:

> New devices may be used to adapt the ancient institution [of trial by jury] to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that *enjoyment* of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

Appellant has been found guilty under three counts of using the United States mails in furtherance of a scheme to defraud. If, with his consent, he has been tried and convicted by a jury of *eleven* jurors of the vicinage, still he has been afforded all the essential benefits of trial by jury. He has been denied no fundamental rights of American citizenship, because a citizen of any of our States, enjoying equally the privilege of American citizenship, may be convicted in a State court of any crime by a jury of any number, or with no jury trial at all, if the State law so provides. And he has been denied no rights, fundamental or otherwise, which he can not consent to waive, because, as stated by Mr. Justice Brewer in the *Schick case, supra:*

> When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.

## CONCLUSION.

Unless this court concludes that appellant may successfully attack the verity of the record collaterally in this habeas corpus proceeding, the question of the constitutionality of his trial before an alleged jury of eleven is not here presented to it for its decision. Basing our argument upon the contention that such a collateral attack can not be here sustained, we therefore urge that the constitutional question is not now properly presented to this Court. As Mr. Justice Holmes stated in delivering the opinion of this Court when the case was here on man-

damus, "In this case the facts were more or less clearly admitted at the argument *but the record does not establish them* and the extent of agreement or dispute with regard to them does not change the remedy to be sought."

If, however, defendant can now raise the question in this proceeding, then we earnestly submit that he has had the trial by jury in the form which he desired and that the jury, thus accepted by him and to which he submitted the issue, has found him guilty and that he should not now destroy that verdict by adding to his crime a gross breach of faith to the Court and jury which tried him, a breach of faith the more reprehensible because he was a member of the bar and in a special sense owed the Court loyalty in word and deed.

Solicitude for the rights of defendant in criminal cases is entirely proper, but there must be a limit to the rights of a defendant to juggle with the processes of law to save himself from the consequences of his crime.

JAMES M. BECK,
*Solicitor General.*
RUFUS S. DAY,
*Special Assistant to the Attorney General.*

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